NEW CHING KEE v. K.E. HILBORNE & ORS.

[O.C.J. (Kulasekaram J.) March 7, 1978]
[Singapore — Suit No. 493 of 1976]

Legal Profession — Advocate and Solicitor — Professional Negligence — Action against solicitors for breach of implied term of engagement — Solicitors' failure to serve writ of summons within time — File relating to matter misplaced — Renewal of writ disallowed by court — Claim for damages against defendants as solicitors.

The plaintiff was involved in a traffic accident on November 18, 1970 when he was run into by a motor scooter ridden by one Lim. As a result of this accident, he suffered a bad fracture of the humerus resulting in some disability and limitation in the movement and action of that arm. The defendants, advocates and solicitors, were engaged by the plaintiff to act for him in his claim against Lim for damages arising out of the accident. The plaintiff claimed that the defendants had negligently and in breach of the implied term of their agreement failed to serve the writ of summons on Lim before August 7, 1974 on which date the action against Lim became statute-barred.

The defendants' main reason why they found themselves having to apply for renewal of the writ on July 31, 1974 for a period of 6 months as from August 7, 1974 was that their file relating to the plaintiff's matter had been misplaced in their office from August 21, 1973 till July 29, 1974.

Held: (1) the defendants were negligent in having failed to serve the writ within the 12 months allowed them before it expired on August 7, 1974;

(2) damages amounting to $12,255.20 (general damages of $6,000 for injury and special damages $6.255 for expenses incurred) were awarded to the plaintiff on the basis that this was the sum he would have received in his claim against Lim had it been successfully proceeded with and it being undisputed that Lim was 100% to blame for the accident.

[Editorial Note: This case arose out of the failure of the plaintiff in his application to renew a writ claiming for damages in *New Ching Kee* v. *Lim Ser Hock* [1975] 2 M.L.J. 183.]

Case referred to:-

(1) *Jones* v. *Jones* [1970] 3 All E.R. 42.

CIVIL SUIT.

Karuppan Chettiar for the plaintiff.

K.E. Hilborne for the defendants.

Kulasekaram J.: The plaintiff in this action was involved in a traffic accident on November 18, 1970 when he was run into by motor scooter registered No. SAK 5224, ridden by one Lim Ser Hock. As a result of this accident he sustained personal injuries.

The defendants during all the material time are the partners of the firm of Hilborne & Co., advocates and solicitors practising as such in Singapore.

In late November 1970 the plaintiff engaged the defendants' firm to act for him in making a claim and if necessary in taking proceedings for damages against the said Lim Ser Hock arising out of the traffic accident.

It was alleged by the plaintiff that the defendants had negligently and in breach of the implied term of their engagement by the plaintiff failed to take due steps to have the writ of summons served on the said Lim Ser Hock before August 7, 1974 on which date the action against the said Lim Ser Hock for damages arising out of the said traffic accident became statute-barred. The plaintiff claims damages against the defendants.

The defendants in their defence denied liability.

The main witnesses on the issue of liability were the plaintiff New Ching Kee and Lee Hien Weng who was the managing clerk of the defendants' firm and clerk in charge of the plaintiff's case.

The evidence placed before me revealed that the plaintiff after his traffic accident on November 18, 1970 went to the offices of the defendants' firm, M/s. Hilborne & Co. of 22 Nunes Building, a firm of advocates and solicitors, and engaged them to act for him in making a claim and if necessary for taking proceedings for damages against the said motor scooterist Lim Ser Hock in respect of the aforesaid motor accident. It was Mr. Lee in the defendants' firm whom the plaintiff saw and who after taking down particulars from him told the plaintiff he would write to him after investigation. On February 10, 1971 plaintiff called at the office of M/s. Hilborne & Co. and paid $50 for disbursements and thereafter from time to time either on receipt of letters from them or on his own initiative went to their office and saw Mr. Lee as to how his matter was progressing.

During the first year or two, the defendants carried on some desultory correspondence with Taisho Marine & Fire Insurance Co. Ltd., (hereinafter referred to as Taisho) the insurers of this motor scooter SAK 5224 which was involved in this accident hoping to negotiate a settlement of the claim and culminating in their letter of November 29, 1970, AB10, wherein they suggested $13,000 as an appropriate quantum of damages, $10,000 being for loss of earnings and expenses for extra hand as help in plaintiff's farm and $3,000 as damages for his personal injury to the arm.

On August 7, 1973 the defendants issued the writ of summons in Suit No. 1652/73 in this matter against the said Lim Ser Hock before the 3 year period under the Limitation Act ran out which would be on November 18, 1973. The next day, that is on August 8, 1973, the defendants sent a notice to Taisho of the commencement of proceedings in Suit No. 1652/73 as at AB16.

On August 17, 1973 Messrs. Battenberg & Talma, as solicitors for Taisho, came into the picture and wrote to the defendants as at AB17, asking them to kindly withhold further proceedings in Suit No. 1652/73 until they had assembled all the facts regarding the accident. They also asked the defendants how they had arrived at their suggested figure of $10,000 for loss of earnings of the plaintiff and accepted $3,000 as damages for the personal injury to the plaintiff.

Meanwhile on August 15, 1973 the defendants had made an appointment with the court process server for August 22, 1973 to have the writ of summons served on the said Lim Ser Hock and had also accordingly informed the plaintiff to be present at their office on August 22, 1973 to effect the service. The letter, AB17, from M/s. Battenberg & Talma was received at the defendants' office on August 21, 1973 and on August 22, 1973 no attempt was made to serve the writ. According to Mr. Lee even if the plaintiff had attended on the defendants' office on August 22, 1973 in view of the letter AB17 they would not have served the writ.

This letter AB17 from M/s. Battenberg & Talma was never replied by the defendants. According to Mr. Lee when this letter was received by them on August 21, 1973 their file relating to plaintiff's matter was missing in their office, though it was there when they issued the writ and filed the statement of claim in the Suit No. 1652/73 on August 7, 1973. Two further letters were received by the defendants from M/s. Battenberg & Talma. The first was dated October 23, 1973 as at AB18, wherein they drew attention to their not having heard on their letter AB17 and saying they were trying to make an offer with a view to settling the matter out of court and asking for some proof of how they arrived at the sum of $10,000 for loss of earnings and accepting the figure of $3,000 as damages for the injury. In the next letter dated November 1, 1973, as at AB19, M/s. Battenberg & Talma again drew attention to their not having heard from the defendants to their earlier letter and saying they had by then completed their investigations and that in their view liability should be apportioned equally.

It was Mr. Lee's evidence that all these 3 letters from M/s. Battenberg & Talma remained unanswered and unacknowledged and no action whatsoever was taken on them as the file was missing. He made a general search for the file on 2 occasions without success and he had also asked Mr. Chua, an office boy in their office, to look for it but he too had not located it. This file had got misplaced during the normal movement of the files within the office and not when the defendants' firm removed their premises from Nunes Building to Colombo Court in May 1973. This file was only recovered about July 29, 1974. Mr. Chua, the office boy, had found it within another file on that day and had brought it to the notice of Mr. Lee. While the file remained mislaid for all these long months no action whatever was taken regarding the plaintiff's matter though the defendants knew about the file being missing from at least August 21, 1974 and in spite of the three letters I have referred to from M/s. Battenberg & Talma. No exhaustive search of any kind was made by the defendants to recover the file. No attempt was made by the defendants after the file was missing to contact the plaintiff on M/s. Battenberg & Talma's letters or for any other purpose at all. Mr. Lee said he did not know the plaintiff's address to contact him. In cross-examination however he agreed that from M/s. Battenberg & Talma's letters he could have got the number of the suit and also their file number. From these he agreed he could have got the plaintiff's address from their clients' register. They could also have traced the address of the plaintiff by inspecting the writ in the registry of this court.

When Mr. Lee was cross-examined as to why no further appointments after August 22, 1973 and before August 7, 1974 were made to have the writ served he replied that the file was missing. When the file was found around July 29, 1974 Mr. Lee's first concern according to him was to file an application to renew the writ before it expired on August 7, 1974. As soon as the file was found on July 29, 1974 it did not occur to him to try and have the writ served during the 9 or 10 intervening days, before the date of expiry of the writ.

The *ex-parte* application for the renewal of the writ was made on July 31, 1974 and it came up for hearing before the Assistant Registrar on August 16, 1974. The affidavit in support of this application sworn by Mr. Lee on July 31, 1974 stated that the writ had not been served "for reasons of negotiations and the subject matter of the claim is still pending negotiations". The Assistant Registrar on that occasion adjourned it for further hearing on August 23, 1974. A further affidavit was filed sworn by Mr. Lee on August 21, 1974 wherein he exhibited a copy of the letter AB18, dated August 23, 1973, from M/s. Battenberg & Talma "as the negotiation" referred to in his earlier affidavit and in addition stated therein "Unfortunately, the file relating to this matter has been mislaid in the office and was recently found.". The Assistant Registrar on August 23, 1974 granted the application and renewed the writ for a further period of 6 months as from August 7, 1974.

Nothing was done by the defendants after the renewal of the writ till November 20, 1974 when they wrote to plaintiff, as at P2, asking him to call at their office on November 28, 1974 in order to accompany the court process server to effect service of the writ on the defendant therein. Plaintiff did attend at the offices of the defendants on November 28, 1974 but service of the writ could not be effected as the defendant Lim Ser Hock was not in. Two further attempts to serve the writ on December 26, 1974 and December 28, 1974 were also unsuccessful.

Meanwhile on December 27, 1974 that defendant the said Lim Ser Hock when he heard about the attempts to serve him called on M/s. Battenberg & Talma who then got in touch with the defendants and eventually on January 3, 1975 accepted service of the writ on behalf of the said Lim Ser Hock. Thereafter on January 7, 1975 M/s. Battenberg & Talma applied to have the renewal of the writ set aside. A further affidavit was filed by Mr. Lee opposing this application wherein he stated:

> "At or around this time there was a reshuffle of equipment and files which were removed from Messrs. Hilborne & Company's former premises at Nunes Building to 701-2 Colombo Court, Singapore, and in the course thereof, the files in connection with this matter were mislaid and hence some of Messrs. Battenberg & Talma's letters were not replied to. Subsequently extensive and exhaustive searches were conducted and the said files were found.
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> Upon discovery and retrieving of the said files an application was made to this Honourable Court to extend the validity of the Writ of Summons herein."

On January 20, 1975 the Deputy Registrar ordered the renewal of the writ and the service of the writ to be set aside. The defendants appealed against this order of the Deputy Registrar to this court and the learned Mr. Justice Chua who heard this appeal dismissed it with costs on April 1, 1975 and confirmed the order of the Deputy Registrar. Thereafter M/s. Battenberg & Talma had their Bill of Costs taxed and applied to the defendants for payment of these Bills but no payment was forthcoming from them and finally they replied that they had no instructions from their client. Then M/s. Battenberg & Talma wrote to the plaintiff direct on September 3, 1975, as at P6,

stating that their taxed Bill of Costs against him in respect of some interlocutory applications in connection with his Suit 1652 of 1973 amounted to $2,659.20 cts. and calling upon him to pay them within 7 days. Plaintiff was naturally puzzled when he received this letter from M/s. Battenberg & Talma. The defendants had not informed him either about the setting aside of the renewal of the writ and service by the Deputy Registrar on January 20, 1975 or about the appeal before the learned Mr. Justice Chua and the dismissal of the appeal by him on April 1, 1975. So on receipt of this letter from M/s. Battenberg & Talma he went and saw Mr. Lee at the defendants' office. Mr. Lee told him he could not do anything and handed him a letter of that day's date which was dated September 11, 1975, Exhibit P3, and advised him to go and consult other lawyers.

It is Mr. Hilborne's submission on behalf of the defendants that after the issue of the writ on August 7, 1973 which was within the statutory period of 3 years from November 18, 1970 thereafter they had 12 months, that is, up to August 7, 1974, to serve the writ on the said Lim Ser Hock, the defendant. So on July 29, 1974 when the file was recovered and though the writ had not yet been served on Lim Ser Hock they could not be said to have been negligent in any way till then for not having served the writ upon them. According to him the critical period was between July 29, 1974 and August 7, 1974 when the writ expired. Had the defendants in any way been negligent during this period? He submits they had not been. He further submits that on July 29, 1974 when the file was recovered they had 3 courses open to them: —

(1) To try and serve the writ before August 7, 1974.

(2) To try and negotiate with M/s. Battenberg & Talma and reach a settlement on the claim before August 7, 1974.

(3) To apply to the court for the writ to be renewed before August 7, 1974.

The defendants did not attempt the courses in (1) or (2) because in the event of their failing to do so they might have been too late to make the application in course (3) before the date of expiry of the writ on August 7, 1974. They therefore decided to pursue course (3) and made the application for the writ to be renewed for a further period of six months as from August 7, 1974 on July 31, 1974. In the event they ultimately failed in their application to have the writ renewed. Mr. Hilborne submits that by so pursuing course (3) and not attempting to serve the writ within the 9 or 10 days before the expiry of the writ they could not be said to have acted negligently in any way. At worst they had made an error of judgment. He further submitted that the defendants could have in addition to following course (3) also followed course (1) in trying to serve the writ. Here again if the defendants had not done this it was again an error of judgment and not negligence on their part.

The defendants had 12 months after the issue of the writ to serve it. That is the time given them by law and they can do it at any time during the 12 months. Even if they served it on the last day no one can say they had been negligent though they might be criticised for it. It was to a similar statement of the position by Salmon L.J. in *Jones* v. *Jones*[1] that Mr. Hilborne referred me to in his submission. But if they found themselves in a situation, as they did here, where they had to make an application on behalf of the plaintiff to have the writ renewed for a further period beyond the life of the writ, whether the application was made before or after the expiry of the writ, the court in considering such an application will not grant it as a matter of course. It will only grant such an application if there is good cause or sufficient reason to do so. That is, I believe, the accepted law. The court will consider the reasons for the defendants making this application. Their conduct in this matter after the issue of the writ comes under scrutiny along with various other factors depending on the circumstances of each case. It will also compare the hardship a plaintiff would suffer if such an application were refused against the hardship a defendant would suffer if the application were granted.

In the present case I find the defendants' main reason and almost the only reason why they found themselves in that position on or about August 29, 1974 where they had to make the application on July 31, 1974 for renewal of the writ for a period of 6 months as from August 7, 1974 was that their file relating to plaintiff's matter had been misplaced in their office from as early as August 21, 1973 a few days after the issue of the writ till July 29, 1974. This is what Mr. Lee told in cross-examination: —

"*Q.* Why did you not make any further appointment between August 22, 1973 and until August 7, 1974 for serving the writ?

A. The file was missing.

I agree the file was found around July 29, 1974."

It was suggested in the affidavits of Mr. Lee in support of the defendants' application that negotiations between the parties in question as a reason for the application. The evidence before me showed there were no negotiations as such during the 12 months after the issue of the writ on August 7, 1973. At best the three letters from M/s. Battenberg & Talma were an invitation for negotiations but the defendants took no action whatever at all on any of the three letters. In one of the letters there was some reference to the defendants' earlier overtures with Taisho on a possible negotiated settlement. In fact there was no negotiation during the relevant period.

I find the defendants were negligent in having failed to serve the writ within the twelve months allowed them before it expired on August 7, 1974 when the plaintiff's claim against the said Lim Ser Hock became statute-barred.

If the defendants had made a proper concerted and exhaustive search for the file soon after it was found missing they would have either found the file many months earlier than July 29, 1974 or if in fact it was not available at the end of such a search they could have taken various steps to get all the necessary information and put matters right. Even the file could have been reconstructed without much difficulty.

They would certainly not have been in the position they found themselves in when the file was eventually discovered on July 29, 1974. The defendants have only to blame themselves for it. I cannot agree with Mr. Hilborne's submission that only their conduct during the so called critical period between July 29, 1974 and August 7, 1974 has to be looked into to decide whether the defendants had been negligent. I am afraid their conduct over the whole period after the issue of the writ till its expiry comes under scrutiny once they had placed themselves in such a situation.

Having regard to Mr. Hilborne's criticisms of the learned Mr. Justice Chua's decision for setting aside the renewal and service of the writ the defendants' conduct thereafter in remaining silent till September 11, 1975 when the plaintiff called at their office was by no means helpful.

Now there is only the question of damages the plaintiff is entitled to here.

First of all he should get all that he would have received in his claim against the said Lim Ser Hock in Suit 1652/73 had it been successfully proceeded with. It is not in dispute that the plaintiff was free of blame in his traffic accident and so his claim in his action would be based on the basis of that defendant Lim Ser Hock being 100% to blame.

The plaintiff as a result of this accident suffered a bad fracture of the humerus resulting in some disability and limitation in the movement and action of that arm. Having regard to the medical reports concerning his injury and the end result after all the treatment and having considered the evidence of Dr. Balachandran, the Deputy Head of the Orthopaedic Department of the Singapore General Hospital and the awards in comparable cases I assess general damages for pain and suffering and loss of amenities, etc. as a result of this injury at $6,000. I find the plaintiff has proved his claim for special damages for loss or additional expenses incurred in having to employ an additional farm hand to do his work while he was incapacitated at $2,684 and I allow that amount as claimed. I further allow the other 2 agreed items of special damages Hospital fees and Transport at $292 and plaintiff is also entitled to the taxed costs of $2,659.20 cts. with interest at 8% from April 1, 1975 till today, March 7, 1978 amounting to $620 which he has been ordered to pay the said Lim Ser Hock for the interlocutory proceedings in that action.

There shall therefore be judgment for the plaintiff for the total of these sums amounting to $12,255.20 with costs.

Order accordingly.

Solicitors: *Murphy & Dunbar; Hilborne & Co.*

LIAN HUAT & CO. (PTE.) LTD. v. MEGAH COMMERCIAL CO.

[O.C.J. (Chua J.) March 28, 1978]
[Singapore — Suit No. 2983 of 1975]

Sale of Goods — Sale of Papua nutmegs — Purchasers' refusal to take unless nutmegs of "international quality" — Surveyor's refusal to issue certificate to that effect — Sellers' claim for damages.

Contract — Agreement to purchase Papua nutmegs — Breach of — Purchasers' refusal to purchase unless nutmegs of "international quality" — Damages, — Sellers' claim for damages — Terms of contract.

The defendants agreed to purchase from the plaintiffs 10 metric tons of Singapore nutmegs BWP by contract AB1 and 40 metric tons of Papua nutmegs BWP and 10 metric tons of Papua nutmegs ABCD by contract AB2. Before contract AB1 was signed a sample of the Singapore nutmegs BWP was shown to the defendants. Contract AB2 was not a sale by sample, but it was agreed by the parties that the "buyers shall nominate their own representative to supervise the quality and weight at seller's store before taking delivery...." Subsequently, the defendants refused to take the nutmegs under AB1 on the ground that they were not of quality and they complained that the nutmegs under contract AB2 were not up to "international quality." A surveyor was appointed to survey Papua nutmegs ABCD and he found that the nutmegs were Papua nutmegs ABCD. The surveyor was, however, not prepared to issue a "Certificate of international quality" as required by the defendants as he had never heard of such a certificate. The defendants refused to take delivery of the nutmegs in the two contracts unless a "Certificate of international quality" was issued. The plaintiffs claimed damages for breach of contract.

During the course of the trial, no evidence was adduced by the defendants as to what "a certificate of international quality" was.

Held, in favour of the plaintiffs: (1) it was clear from the contract AB2 that the defendants agreed to buy Papua nutmegs ABCD and not nutmegs of "international quality";

(2) the defendants' allegations that the nutmegs in the two contracts were not up to quality were not true.

CIVIL SUIT.

Lim Teck Hui for the plaintiffs.

David de Souza for the defendants.

Chua J.: The plaintiffs' claim against the defendants is for damages for breach of contracts.

By a sale contract in writing dated December 3, 1974, the plaintiffs agreed to sell and the defendants agreed to buy 10 metric tons of Singapore nutmegs BWP to be shipped in February, 1975, terms cash against delivery. (Contract AB1).

By another sale contract in writing dated January 9, 1975, the plaintiffs agreed to sell and the defendants agreed to buy 40 metric tons of Papua nutmegs BWP and 10 metric tons of Papua nutmegs ABCD, to be shipped in January/February, 1975, terms cash against delivery. (Contract AB2).

The evidence of the plaintiffs is shortly this. Before the contract AB1 was signed a sample of the Singapore nutmegs BWP was shown to the defendants. At the time the Contract AB1 was signed they had the goods in their store at Kampong Bahru.

Contract AB2 was not a sale by sample, but it was agreed between the parties and endorsed on the contract as follows: "Buyers shall nominate their own representative to supervise the quality and weight at Seller's Store before taking delivery, Sellers do not